86-900

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO O. LABRANCHE, JR.,

Petitioner,

v.

UNITED STATES OLYMPIC COMMITTEE,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD A. PERKINS
1801 Avenue of the Stars
Suite 406
Los Angeles, CA 90067
(213) 553-2274
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

40pp

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are similar to Questions Nos. 1 and 2 that are presented for review in No. 86-270, *San Francisco Arts & Athletics* v. *United States Olympic Committee,* in which this Court on October 21, 1986, granted a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, reported at 781 F.2d 733. The questions presented by this petition are:

1. If construed so as to empower the United States Olympic Committee (USOC) to prevent all others' use of the common word OLYMPIC or to exact tribute from them for using it, does the Amateur Sports Act (36 U.S. Code § 380) offend against the First Amendment, either facially or in its impact on more than a thousand business enterprises, most of them small, that for years have used the word in their corporate or other names or otherwise for the purpose of trade?

2. Having regard to First Amendment concerns, the language of the Amateur Sports Act, its purpose and legislative history, the Trademark Act that is *in pari materia,* and the widespread use of the common word OLYMPIC by more than a thousand business enterprises, is the Amateur Sports act properly construed to confer on the USOC rights of more than trademark exclusivity in the word so as to entitle the USOC to enjoin all use of it by others, regardless of whether or not such use would tend to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with USOC or any related activity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Leo O. LaBranche, Jr., respectfully prays that a writ of certiorari issue to review a case pending in the United States Court of Appeals for the Ninth Circuit on appeal from a judgment of the United States District Court for the Central District of California, entered in the above-entitled proceeding on November 21, 1985.

OPINIONS BELOW

Pursuant to 28 U.S. Code § 1254(1) this petition for writ of certiorari is submitted before the rendition of a judgment or decree by the court of appeals; accordingly, that court has had no occasion to file any opinion in this case. In granting a motion for summary judgment and in granting a motion to assess attorney fees against petitioner the district court made some remarks that may be considered brief informal opinions; they are not reported, officially or otherwise. They are set forth in Appendices 1 and 2.

JURISDICTION

The district court entered judgment on November 21, 1985, and it made an order awarding attorney fees that was entered December 31, 1985. On November 18, 1985, petitioner, then acting *pro se,* filed a notice of appeal that was technically premature; however, particularly in cases involving *pro se* litigants, it is the practice of the court of appeals to accept a premature notice of appeal as timely in relation to a final judgment that is entered later (*Curtis*

Gallery & Library, Inc. v. *United States* (9 Cir. 1967) 388 F.2d 358, 360; *Firchau* v. *Diamond Nat'l Corp.* 9 Cir. 1965) 345 F.2d 269, 270-271). The appeal is now pending in the court of appeals. Petitioner's brief was filed in that court; since then, proceedings in that court have been stayed because of the pendency in this Court of No. 86-270, which presents some similar questions. This Court has jurisdiction under 28 U. S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes involved are the First Amendment, the Amateur Sports Act of 1978, 36 U. S. Code § 380, and the Lanham Trade Mark Act of 1946, 15 U. S. Code §§ 1114, 1115, 1116, and 1117, pertinent portions of which are set forth in Appendix 4.

STATEMENT OF THE CASE

The Jurisdiction of the District Court

Petitioner's amended complaint in the district court alleged claims under the Constitution of the United States, including the First Amendment, and the Trademark Act of 1946, 15 U. S. Code §§ 1051, *et seq.* Respondent counter-claimed for alleged trademark infringement, invoking the jurisdiction of the district court under the same statutory provisions. The district court had jurisdiction under 28 U. S. Code §§ 1331 and 1338 and 15 U. S. Code § 1121.

Statement of Facts

The USOC was incorporated under federal law in 1950 (Act of September 21, 1950, 64 Stat. 899.) Sec-

tion 9 of that law provided a criminal penalty for the unauthorized use of certain symbols, emblems, or words, but it proved to be unworkable, and remained a dead letter (H. Rep. 95-1627, to accompany S. 2727, 95th Cong., 2d Sess., p. 10; 1978 U. S. Code Cong. & Adm. News 7483.)

The Trademark Act provides for the registration of a trademark "for any or all of the goods and services upon or in connection with which [the applicant] is actually using the mark" (15 U.S.C. § 1112.) In 1971 the USOC registered the word OLYMPIC as a trademark for several classes of goods and services for which the mark was said to be used, none of them including phonograph records.

The USOC was reorganized by the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-396. Provisions of that Act, set forth in Appendix 4, deal with OLYMPIC and other words and symbols and contain language under which the USOC claims the exclusive right to use the word OLYMPIC. The Act also provides (36 U.S.C. § 380(a)) that under certain circumstances any person who uses certain words and symbols without the consent of the USOC shall be subject to suit in a civil action by the USOC for the remedies provided in the Trademark Act of 1946, 15 U.S.C. § 1051 *et seq.*

Infringement of a trademark means such use of another's mark as "is likely to cause confusion, or to cause mistake, or to deceive" (15 U.S. Code § 1114(1),) and in the case of USOC words and symbols, any use "tending . . . to falsely suggest a connection with [the USOC] or any Olympic activity" (36 U.S. Code § 380(a).) The remedies for infringement include injunctive relief and recovery of profits, damages, and

costs, subject always to the principles of equity (15 U.S. Code §§ 1116, 1117.)

The laws by which the USOC was incorporated in 1950 and reorganized in 1978 contained grandfather clauses whereby persons who had used Olympic words and symbols prior to a date in 1950 were allowed to go on doing so (36 U.S.C. § 379.) Even after 1950, however, a great many business entities have commenced using and continued to use the word OLYMPIC in their corporate names or otherwise for purposes of trade in a manner that the USOC contends is forbidden. Petitioner's exhibits filed in the district court included reports from 25 states and five federal agencies showing that more than a thousand of such names are in use.

The USOC has solicited charter-granting authorities of the several states to refuse to permit the use of any corporate name that includes the word OLYMPIC. Some of the states have complied, but others have not.

In 1982 petitioner, a songwriter and phonograph record producer, established an individual proprietorship record business under the name of OLYMPIC RECORDS, in which he invested more than $100,000. In January 1983 he attempted to incorporate his business in California under the name OLYMPIC RECORDS, INC., but the California Secretary of State, evidently acting in response to pressure from the USOC, refused to file the articles. Petitioner succeeded, however, in organizing a New York corporation under that name. He applied to the Commissioner of Patents and Trademarks for registration of the name OLYMPIC RECORDS AND DESIGN, but was refused.

The obstruction that petitioner had encountered in using the name of his own business led him to institute the present action, in which he asserted claims under the Constitution and the trademark laws. He challenged the claim of the USOC to an exclusive right to use the word OLYMPIC so as to bar him and all others from its use for purposes of trade, regardless of any absence of competition or likelihood of confusion. And he sought relief from acts of interference by which the USOC had prevented him from registering his company name as a trademark and from incorporating his business in California under its own name. The USOC denied his claims and counterclaimed for trademark infringement.

Moving for summary judgment, the USOC did not contest any of the facts alleged in petitioner's amended complaint or set forth in his exhibits. In support of the motion it submitted only some factual information that had been taken from petitioner's exhibits, *viz.*: Petitioner had published a fictitious name certificate to do business under the name OLYMPIC RECORDS; incorporation of OLYMPIC RECORDS, INC., had been refused in California; and his application for trademark registration of OLYMPIC RECORDS AND DESIGN had likewise been refused. There was no evidence of anything tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with USOC or any Olympic Games activity. In opposition to the motion for summary judgment petitioner invited attention to numerous official reports showing the widespread use of the word OLYMPIC by many others for purposes of trade.

Summary judgment went against petitioner, the district court being of opinion that his contentions had been foreclosed by a decision rendered by the court of appeal in the litigation that this Court now has under review in No. 86-270.[1] The judgment against petitioner included a permanent injunction against use of the word OLYMPIC for purposes of trade and orders for the recovery of profits and for the surrender and destruction of packages, labels, etc. And the district court assessed attorney fees against petitioner, finding that the case was an exceptional one and declaring that in view of controlling authority his position was "at least quixotic and probably frivolous."

Petitioner appealed from the summary judgment. During the pendency of his appeal this Court granted the writ of certiorari in No. 86-270, in which some similar questions are presented.

Similarity of This Case and No. 86-270

This case and No. 86-270 have both similarities and differences. In both cases the USOC successfully maintained its claim of right to prevent all others' use of the word OLYMPIC, without regard to any competition or likelihood of confusion; and in both cases summary judgments and permanent injunctions were granted as prayed. There are some differences: No. 86-270 involved "Gay Olympics" as the title of

[1] The precedent the district court referred to was not the decision reported at 781 F.2d 733, that this Court is to review; that came later. What the district court referred to was an unreported opinion on a memorandum affirmance (707 F.2d 517) of a preliminary injunction. The district judge, sitting by designation, had participated in the decision of that appeal.

a nonprofit athletic event, whereas this case has to do with "Olympic records" as the name of a phonograph record business and the goods it dealt in—clearly a commercial use, with no connection with athletics. But whatever the differences, they were of no consequence so far as concerned the courts below; both enjoined all use of the word OLYMPIC on the same theory, which the court of appeals in No. 86-270 expressed in a published opinion and which the district court in this case adopted without discussion in deference to court of appeals precedent.

We are informed that in the proceedings in No. 86-270 there was some discussion (not mentioned in the court of appeals opinion) of the use of the word OLYMPIC in the names of business enterprises; and in an opinion dissenting from denial of rehearing en banc Judge Kozinski, joined by two other circuit judges, took judicial notice of some names found in directories (789 F.2d 1319, 1323 n. 4.) But a much fuller record on the subject was made in this case, in which, as stated, official reports from 25 states and five federal agencies show the use of the word OLYMPIC by more than a thousand business enterprises that are presumably liable to suit by the USOC for injunctions, recovery of profits, damages, destruction of packages and labels, and attorney fees.

REASONS FOR GRANTING THE WRIT

I This Case Presents Questions Similar to Some of Those Involved in No. 86-270, in Which the Writ Has Been Granted, But on Different facts. Consideration of the Two Cases Together Will Enable the Court to Render Decisions of Greater Applicability That Will Furnish More Guidance to the Lower courts and to Actual and Potential Litigants.

This case and No. 86-270 have important issues in common: whether the Amateur Sports Act of 1978 grants the USOC the right to prevent all others' use of the word OLYMPIC, without regard to any competition or tendency to deceive; and whether, if so construed, the Act offends against the First Amendment. But there are differences. The record in this case shows the widespread use of the word OLYMPIC in trade by a great many business enterprises whose names, like petitioner's, are at risk if the USOC's contention is accepted.[2] But No. 86-270 involves some special facts and special issues. That case has to do with the use of the words "Gay Olympics" as the name of a series of athletic events participated in by homosexuals; and one of the contentions made on their behalf is that the injunction against them is a measure of invidious discrimination because of their sexual orientation.

---

[2] The USOC's campaign against alleged infringers has been publicized on nationwide television (Petitioner's Exhibit 5, "CROSSROADS" - transcript of broadcast over the CBS television network August 1, 1984.) The USOC has been publicly reported as having warned a number of small businesses, including a restaurant-pizzeria and a health club, to change their names (New York Times, September 14, 1986, pp. D23-D34; Philadelphia Inquirer, September 14, 1986, pp. Cl-C2; Wall Street Journal, October 28, 1986, p. 37.)

Because of the special facts and special issues involved in No. 86-270 a decision of that case alone and without consideration of this case might rest, or might be thought to rest, on idiosyncratic facts such that the decision would still leave open the question whether the USOC has the right it claims to prevent more than a thousand others' use of the word OLYMPIC for purposes of trade. Of course this Court does not sit merely for the correction of error. Having regard to its pre-eminent place in the judicial establishment and the volume and variety of its business, the Court uses its time and resources to best advantage by rendering decisions of greater rather than narrower applicability. In this instance that can best be done by granting the writ in this case and considering it along with No. 86-270.

The circumstance that the court of appeals has not yet decided this case is not an obstacle (28 U. S. code § 1254(1).) The grant of certiorari in such cases is not common, but there are a number of precedents for it; some are collected in Stern, Gressman & Shapiro, *Supreme Court Practice,* 6th ed. 1986, p. 228 n. 77.

For example, in *Porter* v. *Dicken,* 328 U.S. 252, 254, certiorari was granted before judgment below "by reason of the close relationship of the important question raised to the question presented in [another case in which the writ had previously been granted.]." That is the situation presented here.

The record in this case contains information that can be of assistance to both the Court and the parties in No. 86-270 in resolving the question involved in that case as well. The great "dilution" of the word OLYMPIC as a trademark by its widespread use as

shown by the record in this case has a bearing on the reasonableness of a construction of the Amateur sports Act that would confer on the USOC the right to prevent others' use of the word, to the detriment of a great many established business enterprises. And although in this case the information was presented to the district court by way of exhibits, it consists of mostly official reports that would be entitled to judicial notice and in any event constitute so-called "legislative facts" that need not be received in evidence in order to be considered, as such facts have been, early and late (e.g., *Muller* v. *Oregon,* 208 U.S. 412, 419-421; *Brown* v. *Board of Education,* 347 U.S. 483.)[3]

For the reasons stated, the writ of certiorari should be granted in this case, not merely as an incident to No. 86-270, but as a source of important information relevant to the determination of both cases.

II If Construed So As to Enable the USOC to Prevent All Others' Use of the Word Olympic For Purposes of Trade Without Regard to Competition or Tendency to Confuse, the Amateur Sports Act Offends Against the First Amendment.

As stated, under the Amateur Sports Act of 1978 the USOC claims the right to prevent all others' use of the word OLYMPIC regardless of any absence of competition or tendency to deceive, and in this case the district court accepted that contention in reliance on court of appeals precedent in the case that is to be reviewed in No. 86-270.

---

[3] No question of unfairness or lack of notice would be involved, for general counsel for the USOC participated in both No. 86-270 and the proceedings in the district court in this case, in which the information was presented.

The unprecedented monopoly of a word conferred on the USOC under its construction of the Amateur Sports Act is well described in Judge Kozinski's dissent (concurred in by two of his colleagues) from denial of rehearing in the *San Francisco Arts & Athletics* case, as a "sweeping exercise of sovereign power, implicating principles of individual liberty protected by our Constitution." "The rights conferred on the USOC by the Amateur Act are materially different from traditional intellectual property rights where a careful balance is struck between the interests of the property owner and those of the public." "Here, the Act's ironclad prohibition against every commercial or theatrical use of the word Olympic (unrestrained by the need to show likelihood of confusion or to overcome Lanham Act defenses) stakes out an intellectual property fiefdom quite unlike anything we have seen in our law before." "If Congress has the power to grant a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public discourse can be impoverished." (789 F.2d 1319, 1320, 1321-1322, 1322-1323.)

The basic First Amendment argument was made in the petition for certiorari that was granted in No. 86-270, and will not be repeated here. But, as distinguished from that case, this one involves commercial speech. We shall comment on that difference.

It is now settled that the First Amendment protects commercial speech from unwarranted government regulation (*Central Hudson Gas & Elec. Co.* v. *Public Service Commission,* 447 U.S. 557, 561; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 761-762.) There is of course

a common-sense distinction between commercial and other varieties of speech; commercial speech occurs in an area that is traditionally subject to government regulation (*Central Hudson Gas & Elec. Co., supra,* at 562; *Ohralik* v. *Ohio State Bar Assn.,* 436 U.S. 447, 455-456.) The use of a trade name is a form of commercial speech, and has been regulated, even to suppression, where there is a "history of false and misleading uses of . . . trade names" (*Friedman* v. *Rogers,* 440 U.S. 1, 11, 14-15.) But there is no such history in this case, and the courts that have so far rendered decisions in this case and in No. 86-270 have refused to require the USOC to make a showing of any tendency to deceive in order to enjoin against others all use of the word OLYMPIC.

When, as in this case, speech is neither misleading nor related to unlawful activity, government must assert a substantial interest to be achieved by restrictions on commercial speech; the regulatory technique must be in proportion to that interest, and if that interest could be as well served by a more limited restriction, excessive restrictions cannot survive (*Central Hudson Gas & Elec. Co., supra,* at 564.) The rights conferred on the USOC by the Amateur Sports Act are said to be justified by a governmental interest in helping it raise funds from nongovernmental sources through the sale of commercial "sponsorships" to private enterprise. But if that is accepted as a legitimate governmental interest, the means employed by the Amateur Sports Act as construed by the USOC are surely excessive; the governmental interest could be as well served by a more limited restriction, so that the excessive restriction ought not be permitted to survive.

The sale of commercial sponsorships for the 1984 Olympic Games in Los angeles was a great success. The Games' operating budget of $472 million was met and exceeded. Domestic television rights alone brought in $225 million, and European and Japanese rights $40 million more. Peter Ueberroth, head of the Los Angeles Olympics Organizing Committee, established a minimum fee of $4 million payable by sponsors, and at least 32 sponsors signed up to pay that much or more. Total income from corporate sponsorships was anticipated to reach $150 million, far exceeding original projections. The sponsorship agreement allowed sponsors to exploit the 1984 Olympic Games through symbols, the interlinked five rings of the International Olympic Committee's flag and symbols of the 1984 Olympic Games, a "Star-in-Motion" and "Sam the Eagle," the official mascot.[4] There has been no suggestion that the word OLYMPIC alone was ever sold to or used by any sponsor, or that the value of sponsorships was in any way impaired by the contemporary and long-standing use of the word by more than a thousand business enterprises, most of them small, which in any case would not have been of interest to the USOC because they could not afford the $4 million minimum fee demanded of commercial sponsors of the Olympic Games.

We submit that both a priori and from the vantage of experience it is plain that advancement of a gov-

[4] Bill Toomey and Barry King, *The Olympic Challenge*, 1984, "Published in Association With the United States Olympic Committee," pp. 70-73; Bill Henry, *An Approved History of the Olympic Games*, 1981 ed., "sponsored by the Southern California Committee for the Olympic Games," p. 459. The 1984 Olympic Games produced a surplus of $215 million (Peter Ueberroth, *Made in America*, 1985, p. 369.)

ernmental interest in the prosperity of the USOC does not require the absolute prohibition of all uses of the word OLYMPIC by others for purposes of trade. The most that is needed is a restraint on infringement in the ordinary trademark sense, which means such use of a trademark as "is likely to cause confusion, or to cause mistake, or to deceive" (15 U.S. Code § 1114,) or, in the special case of the USOC, any use "tending . . . to falsely suggest a connection with [USOC] or any Olympic activity" (36 U.S. Code § 380(a).) Nothing more is needed, and anything more, such as the absolute prohibition the USOC contends for, is excessive and impermissible under the First Amendment.

III The Language of the Amateur Sports Act Is Susceptible of a Narrower Construction Than That Which the USOC Insists On and the Courts Below in This Case and in No. 86-270 Have Adopted. Having Regard to First Amendment Concerns and the History and Purpose of the Statute, the Narrower Construction Should Be Adopted. So Construed, the Statute Does Not Support the Judgment and Injunction Against Petitioner.

Subsection (c) of 36 U.S. Code § 380 declares that the USOC shall have the "exclusive right" to the use of certain words, including OLYMPIC. But in this case, as in others involving federally chartered corporations, "it appears that Congress' objective has been to prevent the *deceptive or confusing use* of these corporations' mottoes, emblems, and the like by unauthorized persons" (emphasis supplied) (*Stop the Olympic Prison* v. *United States Olympic Committee* (S.D.N.Y. 1980) 489 F.Supp. 1112, 1119-1120.)

A more important consideration has to do with subsection (a), which in part now pertinent provides:

> "(a) Without the consent of [the USOC], any person who uses for the purpose of trade . . . (4) the words 'Olympic', . . . , or any combination or simulation thereof *tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [the USOC] or any Olympic activity;* . . . shall be subject to suit in a civil action by the [USOC] for the remedies provided in . . . the Trademark Act of 1946 . . ." (emphasis supplied.) (36 U.S. code §380(a).)

The emphasized language concerning tendency to cause confusion, mistake, deception, and false suggestion of a connection with the USOC is parallel to language of the Trademark Act, which defines the use of a registered trademark that gives rise to liability; that is to say, under that Act only such use of a mark as is likely to cause confusion, etc., is actionable. But the USOC, supported by the courts below in this case and in No. 86-270, have construed the Amateur Sports Act differently; the qualifying dependent clause "tending to cause confusion," etc., is interpreted as being applicable only to the use of "any combination or simulation" of the listed words and not to the use of any one of the words OLYMPIC, etc., taken separately.

But even if the construction for which the USOC contends is a possible one, it is not the only one, and even taking the language alone, not the better one. "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all" (*Porto Rico Ry. Co.* v. *Mor*, 253 U.S. 345, 348.)

We have adverted to the First Amendment concerns that are implicated by a broader interpretation of the Amateur Sports Act that would bestow on the USOC an unconditional right to prohibit all others' use of the word OLYMPIC. Such concerns recommend a narrowing construction of the statute (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134-136; *U. S. Civil Service Commission* v. *Natl. Assn. of Letter Carriers*, 413 U.S. 548, 571.) And as we have pointed out, the narrower construction provides the USOC with all the protection it needs in order to sell sponsorships, as it has done with such success. That interpretation is correct and should be adopted.[5]

By the terms of the Amateur Sports Act, the unauthorized use of the protected words and symbols is subject to suit in a civil action for the remedies provided in the Trademark Act. The availability of those remedies depends on the likelihood of confusion, and they must be administered "according to" and "subject to the principles of equity" (15 U.S. Code §§ 1116, 1117.) Both at common law and under trademark statutes, the widespread use of a mark by many others without effective challenge may be interposed as a defense when one who claims ownership of the mark sues for infringement (*Republic of France* v. *Saratoga Vichy Co.*, 191 U.S. 427, 436-437; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U.S. 19, 35-37; *American Thermos Prod. Co.* v. *Aladdin Industries, Inc.*

---

[5] Some other arguments have been made and some other authorities have been cited, pro and con, on the interpretation of the Amateur Sports Act. We shall not further extend this petition by discussing them. We have treated them in a brief in the court of appeals, and we shall do likewise in a brief on the merits in this Court if, as we hope, the writ is granted.

(D. Conn. 1962) 207 F.Supp. 9, 13, 14, 17; *Thierfeld* v. *Postman's 5th Ave. Corp.* (S.D.N.Y. 1941) 37 F.Supp. 958, 961.) In this case there was no showing of any likelihood of confusion, and there was incontestable evidence of the use of the word OLYMPIC for purposes of trade by more than a thousand business enterprises all across the country. The judgment and injunction against petitioner were therefore against law.

CONCLUSION

It is submitted that the writ of certiorari should issue in this case "by reason of the close relationship of the important question raised to the question presented" in No. 86-270 (*Porter* v. *Dicken*, 328 U.S. 252, 254;) because the record in this case furnishes information relevant to a consideration of both cases; and because this case presents a question of general concern to a great many business enterprises, whereas a decision of No. 86-270 alone, because of its special facts, may not be as widely useful as decisions in both cases would be. For those reasons, and because the decision sought to be reviewed in this case is wrong, the writ of certiorari should issue. This case and No. 86-270 should be consolidated for hearing.

If need be, the briefing schedule in this case can be accelerated so that it can be heard with No. 86-270 (as was done, e.g., in *United States* v. *Thomas*, 361 U.S. 950, and *Hannah* v. *Lerche*, 361 U.S. 910.) Petitioner undertakes to comply strictly with any expedited briefing schedule.

Respectfully submitted,

RICHARD A. PERKINS,
Counsel for Petitioner.

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RICHARD A. GADBOIS, JR., JUDGE PRESIDING

No. CV 85-481-RG

LEO OLIVER LABRANCHE, JR.,

Plaintiff,

vs.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, October 21, 1985

LOS ANGELES, CALIFORNIA; Monday, October 21, 1985; 10:00 A.M.

CLERK: Item No. 6, Case CV 85-481, Leo Oliver LaBranche versus U.S. Olympic Committee, defendant U.S. Olympic Committee's motion for summary judgment.

MR. LABRANCHE: Good morning, your Honor. I'm Leo LaBranche.

MR. COLBERT: Good morning. James Colbert for the Olympic Committee.

THE COURT: Mr. LaBranche, what do you have to add to your presentation, sir?

MR. LABRANCHE: In regard to the summary judgment?

THE COURT: Yes.

MR. LABRANCHE: I have nothing further to add than is already in the papers.

MR. COLBERT: I have nothing other than is set forth in the papers, your Honor.

THE COURT: The motion for summary judgment on the complaint and counterclaim is granted.

MR. COLBERT: Thank you, your Honor.

THE COURT: This is a subject about which I know a fair amount, Mr. LaBranche. I was on the Ninth Circuit panel that addressed this whole thing in connection with the San Francisco Arts and Athletics; so it is a subject I know all about.

I am utterly convinced that Mr. Colbert is correct; so you'll have to seek further guidance from the Ninth Circuit if you want to pursue this any more.

The pre-trial conference is off calendar because it is moot.

MR. COLBERT: Your Honor, is the proposed judgment we submitted adequate, or would the Court prefer other and different —

THE COURT: No. I have already signed it. It looked all right to me.

MR. COLBERT: Very good, your Honor.

MR. LABRANCHE: Thank you, your Honor.

MR. COLBERT: Thank you, your Honor.

THE COURT: Thank you.

(Proceedings concluded)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-481 RG

LEO OLIVER LA BRANCHE, JR.
Plaintiff,

VS.

UNITED STATES OLYMPIC COMMITTEE (a corporation),
Defendant.

UNITED STATES OLYMPIC COMMITTEE,
Counterclaimant,

VS.

LEO OLIVER LA BRANCHE, JR.,
Counterdefendant

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

DATE: October 14, 1985

TIME: 10:00 A.M.

The Court having heard and considered the motion of defendant and counterclaimant United States Olympic Committee ("USOC") for summary judgment and the evidence and arguments submitted by the parties in support thereof and in opposition thereto, the Court finds and concludes as follows:

I. FINDINGS OF FACT

1. There are no genuine issues of material fact.

2. The USOC is a federally chartered corporation empowered under the Amateur Sports Act of 1978 to exercise

exclusive jurisdiction over all matters pertaining to the United State's participation in the Olympic Games.

3. Plaintiff and counterdefendant Leo Oliver LaBranche, Jr. ("LaBranche") is a California resident.

4. In late 1982 LaBranche formed a business to record and manufacture phonograph records. In said business, LaBranche traded under the ficticious name of "Olympic Records." LaBranche has formed a New York corporation hearing that name.

5. LaBranche attempted to form a California corporation called "Olympic Records"; but, on January 19, 1983, the California Secretary of State notified him that California would not accept that name for registration because 36 U.S.C. Section 379 prohibited the use of the word "Olympic" without the permission of USOC. Despite being so advised by the State of California, LaBranche continued to used the name Olympic Records in his business.

6. LaBranche also filed a federal Trademark Application seeking to register "Olympic Records" (and a design of a torch) as a trademark for phonograph records and tapes. The United States Patent and Trademark Office rejected the LaBranche application on April 26, 1985.

7. The USOC has never given LaBranche permission to use the term "Olympic," or any other protected Olympic emblem or mark.

8. To the extent that any of the conclusions of law set forth below contain findings of fact, said findings are adopted herein.

II. CONCLUSIONS OF LAW

1. To the extent that any finding of fact set forth above contains a conclusion of law, said conclusion is adopted herein.

2. Section 380 of Title 36, United States Code, violates no provision of the United States Constitution.

3. The USOC is entitled to enforce against LaBranche the rights given it by Congress in Section 380 of Title 36, United States Code, and such enforcement of its rights does not constitute an unlawful act by the USOC.

4. LaBranche has violated the provisions of Section 380 of Title 36, United States Code, in that he has used the term "Olympic" to promote his trade or business and to induce the sale of its products without the permission of the USOC. By reason thereof, the USOC is entitled to the remedies provided by the Lanham Act.

5. The USOC is entitled to a permanent injunction enjoining LaBranche from further infringement of its rights to the term "Olympic" and requiring the destruction of any infringing merchandise.

6. LaBranche is obligated to account to the USOC for any and all profits realized by the sale of products and services utilizing any mark containing the word "Olympic."

7. LaBranche's continued use of the mark "Olympic Records" after being advised that said mark infringes upon the exclusive rights granted to the USOC constitutes willful infringement of said mark and entitles the USOC to recover its attorneys' fees incurred herein.

8. The USOC is entitled to judgment herein on both the claims pleaded by LaBranche and on its counterclaim against LaBranche in the form of the proposed judgment submitted by the USOC with its motion for summary judgment.

DATED: OCT 21, 1985.

/s/RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-481 RG

LEO OLIVER LABRANCHE, JR.,
Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, a corporation,
Defendant.

UNITED STATES OLYMPIC COMMITTEE,
Counterclaimant,

v.

LEO OLIVER LABRANCHE, JR.,
Counter-defendant.

[ENTERED DECEMBER 31, 1985]

ORDER

The motion of defendant United States Olympic Committee for award of attorneys' fees pursuant to title 15 U.S.C. § 1117 is granted. The defendant may recover the sum of $2,000 in this regard in that the court finds this to be an "exceptional case." The plaintiff appeared *pro se,* otherwise the award might be several times the above figure. Notwithstanding the *pro se* appearance, any inquiry—however unsophisticated—would have disclosed that the constitutionality of § 380 has been firmly established in this Circuit. Another attempt at such a challenge is at least quixotic and probably frivolous.

This order does not, of course, reflect any judgment on the reasonableness of the fees actually billed by defense

counsel or the true value of their time. The court credits entirely the representations of counsel in this respect.

/s/ RICHARD A. GADBOIS, JR.
RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-481 RG

LEO OLIVER LA BRANCHE, JR.
Plaintiff,

vs.

UNITED STATES OLYMPIC COMMITTEE (a corporation),
Defendant,

UNITED STATES OLYMPIC COMMITTEE,
Counterclaimant,

vs.

LEO OLIVER LA BRANCHE, JR.,
Counterdefendant.

[ENTERED November 21, 1985]

JUDGMENT AND PERMANENT INJUNCTION

The Court having considered the motion of defendant and counterclaimant United States Olympic Committee ("USOC") for summary judgment, and good cause appearing for entry of a Judgment and a Permanent Injunction as hereinafter set forth,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction of the subject matter and over the parties to this action;

2. Plaintiff shall take nothing by his claims herein.

3. The use by counterdefendant of the term "Olympic Records" as trademark and/or as a trade name on or in

connection with its products infringes upon the rights in and to use of the term "Olympic" granted to the USOC by 36 U.S.C. § 380.

4. Counterdefendant, his successors, legal representatives, and assigns, and his agents, servants, employees, attorneys, and all persons in active concert or participation with said counterdefendant are perpetually enjoined and restrained:

(A) from using the term "OLYMPIC" or "OLYMPIC RECORDS" or any other word or words, term or terms which is or are confusingly similar thereto, is or are a colorable imitation thereof, or suggestive thereof, as a trademark, trade name, brand name, or indication of source or origin on or in connection with any product or any service and/or the advertising, offering for sale, or sale of any product or service;

(B) from using the term "OLYMPIC" alone, and/or as a part of any trademark containing other words or devices, or any trade name, trade style, or designation which includes the word OLYMPIC; and

(C) from committing any acts calculated or likely to cause others to believe that the products or services of counterdefendant are counterclaimant's products or services, or are sponsored or approved by, or connected with, or produced under the supervision of counterclaimant.

5. Counterdefendant is further enjoined and ordered to:

(A) destroy any and all of its labels, packaging, and other documents and material which include the term OLYMPIC or OLYMPIC RECORDS;

(B) destroy any and all of its advertising materials which include, refer, or relate to use of the term OLYMPIC or OLYMPIC RECORDS on or in connection with its products or services;

(C) take such action as is necessary to cause removal from any and all directories or publications of any and all references to defendant or its products or services which include the term OLYMPIC or OLYMPIC RECORDS;

(D) abandon its U. S. Trademark Application Serial No. 452,602 and abandon or otherwise cancel or revoke any other Federal, State or foreign trademark application or registrations which it may have for any mark which includes the term OLYMPIC or OLYMPIC RECORDS;

(E) cancel or cause to be cancelled any and all trade name certificates, registrations, or fictitious name statements which include the term OLYMPIC or OLYMPIC RECORDS and which have been issued or granted to defendant; and

(F) cancel or cause to be cancelled any and all certificates of brand or label approval for any brand or label which include the term OLYMPIC or OLYMPIC RECORDS, and which have been granted or issued to defendant.

5. Counterdefendant is further ordered to account to counterclaimant, and to pay to counterclaimant, all gains, profits and advantages derived by it from its sale of goods or services in connection with which it has used the term OLYMPIC or OLYMPIC RECORDS as an identifying designation or otherwise.

6. This Court retains jurisdiction of the parties hereto with respect to compliance with this Permanent Judgment against counterdefendant.

7. That counterclaimant recover of counterdefendant its costs, including attorneys' fees, in the amount of $ ____.

DATED: OCT. 21 1985

/s/ RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amateur Sports Act of 1978:

> "(a) Without the consent of [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—(4) the words "Olympic", "olympiad", "Citius Altius Fortius,", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity; . . . shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946) . . ."
>
> (c) [USOC] shall have exclusive right to use . . . the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a)." 36 U.S. Code section 380(a)(4) & (c)

Lanham Trademark Act of 1946:

> "(1) Any person who shall, without the consent of the registrant—
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of good or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

shall be liable in a civil action by the registrant for the remedies hereinafter provided. . . ." 15 U.S. code § 1114.

"(a) . . . registration . . . of a mark owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods and services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered . . . ." 15 U.S. Code section 1115(a).

"The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office. . . ." 15 U.S. Code section 1116.

"When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this chapter, the

> plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . The court in exceptional cases may award reasonable attorney fees to the prevailing party. . . ." 15 U.S.C. § 1117.

First Amendment: "Congress shall make no law . . . abridging the freedom of speech. . . ."

No. 86-900

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LEO O. LABRANCHE, JR.,
Petitioner,
v.
UNITED STATES OLYMPIC COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM IN OPPOSITION

EDWARD BENNETT WILLIAMS
VINCENT J. FULLER
JOHN G. KESTER
Hill Building
Washington, D.C. 20006
(202) 331-5000

RICHARD G. KLINE *
EDWARD T. COLBERT
JOSEPH D. LEWIS
One Farragut Square South
Washington, D.C. 20006
(202) 393-5200
Attorneys for Respondents

Of Counsel:
WILLIAMS & CONNOLLY
KLINE, ROMMEL & COLBERT

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-900

LEO O. LABRANCHE, JR.,
Petitioner,

v.

UNITED STATES OLYMPIC COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM IN OPPOSITION

Petitioner, shareholder in a phonograph record business called Olympic Records, Inc., seeks a writ of certiorari before judgment in the court of appeals in order to review the judgment of a district court that enjoined the marketing of such products under the name Olympic. For several reasons, the petition plainly fails to meet the jurisdictional requirements of this Court.

1. Rule 18 of this Court's Rules provides that

> "A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted *only upon a showing that the case is of such imperative public importance* as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." (Emphasis supplied.)

That "imperative public importance" standard does not even begin to be met here. Contrast, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-68 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).[1]

2. In addition, the petition shows on its face that there is doubt whether this case even is jurisdictionally one of those "in the courts of appeals," which is a prerequisite to this Court's certiorari jurisdiction under 28 U.S.C. § 1254. Petitioner, at p. 1 of the petition, expresses the hope that the Court of Appeals would waive the defect in timeliness of the filing of the notice of appeal in the District Court. Whether the Court of Appeals even has power to do so is by no means clear. See 28 U.S.C. § 2107; *cf. Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Browder* v. *Director*, 434 U.S. 257 (1978). In any event, the issue of the Court of Appeals' jurisdiction should be ruled on by that court in the first instance.

3. The alleged injury of which petitioner complains was, the petition demonstrates, an injury to a corporation and not to him personally as a shareholder. Yet his complaint is brought only on his own behalf. In such circumstances, the requirements of standing are not met.

4. Petitioner asserts that he can amplify the arguments in *San Francisco Arts & Athletics, Inc.* v. *United States Olympics Committee*, No. 86-270, currently pending. But he has already had full opportunity to do so.

---

[1] *Porter* v. *Dicken*, 328 U.S. 252 (1946), cited in the Petition at 9, is no authority for such an unwarranted departure from this Court's practice. *Porter* v. *Dicken* was a case in which certiorari was granted on the *same day* as the case raising similar issues and not, as petitioner here seeks, months later. Compare *Porter* v. *Lee*, 328 U.S. 826 (1946) with *Porter* v. *Dicken*, 328 U.S. 827 (1946). Moreover, both those cases raised questions of unusual national importance concerning the power of the Emergency Price Administrator to obtain federal injunctions to enforce the Emergency Price Control Act, Act of January 30, 1942, ch. 26, 56 Stat. 23.

Petitioner (through an association he recently organized called the National Association of Olympic Businesses, and represented by his counsel herein) has filed a brief *amicus curiae* sixty pages in length in that case. He has enjoyed ample opportunity to be heard.

5. It is inappropriate for this petitioner to seek an extraordinary departure from this Court's normal procedures. It was petitioner who, beginning well over a year ago, sought and obtained a series of stays that delayed adjudication in the Court of Appeals.[2] His dilatory conduct in the Court of Appeals precludes him from seeking extraordinary expedition in this Court now.[3]

6. Even if this case had been properly presented to and decided by the Court of Appeals, there would be no reason to grant the writ. Because the constitutionality of § 110 of the Amateur Sports Act, 36 U.S.C. § 380, already is challenged in No. 86-270, which will be argued shortly, this Court's normal practice would be to hold a later petition if properly presented and then remand it to the Court of Appeals for disposition in light of the ultimate decision in No. 86-270. The Court of Appeals quite sensibly has stayed the case awaiting No. 86-270, so that it can dispose of it accordingly. There is no reason prematurely to pull the case up to this Court on an extraordinary basis, only to remand it later to the Court of Appeals.

---

[2] Most of these stays were granted for petitioner's convenience and not, as the petition at p. 2 suggests, because of the pendency of a related case.

[3] On December 15, 1986, this Court denied petitioner's motion to expedite consideration, to consolidate, and for an accelerated briefing schedule.

CONCLUSION

For the reasons stated, the petition should be denied

Respectfully submitted,

EDWARD BENNETT WILLIAMS
VINCENT J. FULLER
JOHN G. KESTER

Hill Building
Washington, D.C. 20006
(202) 331-5000

RICHARD G. KLINE *
EDWARD T. COLBERT
JOSEPH D. LEWIS

One Farragut Square South
Washington, D.C. 20006
(202) 393-5200

Attorneys for Respondents

Of Counsel:

WILLIAMS & CONNOLLY

KLINE, ROMMEL & COLBERT

* Counsel of Record

December 31, 1986

No. 86-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO O. LABRANCHE, JR.,

Petitioner,

vs.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD A. PERKINS
Suite 406
1801 Avenue of the Stars
Los Angeles, California 90067
(213) 553-2274

Counsel for Petitioner

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO O. LABRANCHE, JR.,

Petitioner,

vs.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In opposition to the petition for writ of certiorari herein the respondent has submitted a "Memorandum" that does not mention the merits of the cause. Instead, it merely objects on grounds of jurisdiction, standing, and expediency. As we shall briefly point out, respondent's contentions are based on a misapprenhension of the state of the record in this case and in No. 86-270 and are otherwise insubstantial.

1. Invoking this Court's Rule 18, respondent asserts that this case lacks sufficient importance to be considered by this Court before decision by the court of appeals. Of

course, this Court is the judge of how best to dispose of its resources. We have pointed out how more than a thousand business enterprises are at risk of hostile action on the part of the respondent by which they may be subjected to the injunctive suppression of their trade names, the seizure and destruction of their goods, packages, labels, and advertising, and the imposition of damages and attorney fees on them, so that when the opportunity offers, as it now does, early consideration should be given to the important question of the scope and effect of the Amateur Sports Act of 1978, § 110, 92 Stat. 3048, 36 U.S.C. § 380, as applied to petitioner and many others similarly situated.

2. Respondent asserts that there is an "issue of the Court of Appeals' jurisdiction" in this case because petitioner, then acting *pro se*, filed a notice of appeal before judgment was entered in the district court. There is no such issue. On October 21, 1985, the district court announced its decision to grant respondent's motion for summary judgment (App. 1, Petition for Certiorari). The notice of appeal was filed November 18, 1985 (Petition, p. 1). Judgment was entered November 21, 1985 (Petition, App. 3). The timeliness of the notice of appeal is established by Rule 4(a)(2), Federal Rules of Appellate Procedure, which in pertinent part provides that with exceptions not here material, "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

3. On behalf of respondent it is objected that petitioner lacks standing because he allegedly complains of an injury to a corporation and not to him personally. That is incorrect. Although he happens to be a shareholder in a New York corporation, he was engaged in business as a sole proprietor under a trade name that was challenged, and he

sued individually for wrongs done him individually in preventing him from incorporating his business in California and from registering a trade name of his business as a trade mark; moreover, respondent counterclaimed against petitioner individually and obtained a judgment against him individually for injunctive and other relief. Respondent's objection to petitioner's alleged lack of standing is completely without merit.

4. As respondent states, the constitutionality of § 110 of the Amateur Sport Act, 36 U.S.C. § 380, is already challenged in No. 86-270; however, the constitutional challenge involves the application of the statute in different circumstances, and the different facts of No. 86-270 render it uncertain whether the decision in that case will control this one, or whether the extant stay of this case pending resolution of No. 86-270 will merely delay the disposition of this one. Accordingly, the pendency of No. 86-270 is not reason enough to withhold review of this case.

CONCLUSION

For the reasons stated, respondent's objection on grounds of jurisdiction, standing, and expediency are without merit. The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

RICHARD A. PERKINS

Counsel for Petitioner